SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-609

TERMINAL FREIGHT HANDLING CO. and TERMINAL FREIGHT COOPERATIVE ASSOCIATION,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Regional Director's Opposition to the Petition for Writ of Certiorari herein is based on the assertion that there is no profit to be derived, either by the petitioners or otherwise, from a decision by this Court on the merits

of the question presented. This contention is incorrect and misleading and requires response.

(1) This case arises out of a "Complaint For Mandatory Injunction" which the petitioners filed in the district court when the Regional Director refused to seek injunction relief despite the statutory command of Section 10(1) that he "shall" do so. After permitting the petitioners to be unnecessarily picketed for two weeks subsequent to his conclusion that their rights had been violated by such picketing, the Director finally did seek injunctive relief. By that time, however, the dispute which had given rise to the picketing had been resolved and the picketing had ceased. Under these circumstances, and because the Director persisted in his view that he was under no duty to seek injunctive relief except as his unreviewable discretion dictated, the petitioners amended their district court action; they no longer sought to compel the filing of an injunction petition which had already been filed, but, instead, sought a declaratory judgment as to the nature of the statutory rights and duties created in Section 10(1), as to which the parties had such vastly differing interpretations.

The ensuing litigation was at no time premised upon any alleged need for immediate relief *in this case*. Rather, that litigation was pursued for the express purpose of clarifying the law in an area which was unclear, which was particularly important to charging parties before the Board whose principal protection from the effects of unlawful secondary boycotts was the subject of the dispute, and which involved a regularly recurring problem which would cause similar irreparable injury to others but for judicial resolution.

Illustrative of the need for such a resolution here is the conduct of the Board's agents in the recent case of *Local Union No. 562, affiliated with U. A. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Phillips Plumbing and Heating Co.)*, 17-CC-467. A charge was filed in that case on October 22, 1971 alleging a respondent-union's violation of Section 8(b)(4)-(ii)B of the National Labor Relations Act. Section 10(1) affords mandatory injunctive relief for such violations. On December 3, 1971, almost six weeks later, the General Counsel determined that there existed reasonable cause to believe the charges were true and a complaint should issue. This delay was permitted to occur despite the direction in Section 10(1) that the Board's investigation should be made "forthwith" and be given precedence over all other pending matters except for like charges of unlawful boycott activity. As a consequence of the charged illegal conduct, the aggrieved neutral employer was forced to cease doing business on the job site at which the dispute occurred and consequently lost its contract with the general contractor. Nonetheless, as of December 17, 1971, the Board's agents had neither petitioned for injunctive relief nor effected any other disposition nor granted any other relief. Indeed, the respondent union had not even been contacted by the Board's agents for the purpose of achieving some form of settlement until December 16, 1971.

It is submitted that such conduct cannot be reconciled with the language of Section 10(1) or even the decision of the court below. To the extent that such procedures evidence the Board's view of the permissible limits either of the statutory language or the decision below, the need for elucidation of the rights and duties imposed by Section

10(1) becomes particularly clear,—especially in view of the increasing part of the Board's total caseload which such cases constitute. (See p. 12, Petition for Writ of Certiorari, and statistics set forth there).

(3) The Regional Director's Opposition to the Petition herein seeks to convey the impression that the merits of the underlying dispute are before the Board for consideration so that there is imminent a "final adjudication of the Board" which would render moot all proceedings under Section 10(1). (Br. Opp., p. 7). However, neither the facts nor the conclusion which should be derived from them are as the Director implies. First, this case arose out of a suit for declaratory judgment and was premised on the need for a resolution of a disputed and recurring problem rather than on any need for relief in a specific case. The issuance of a Board order on the merits could not contribute to the resolution of the procedural issues raised in the declaratory judgment action.

More fundamentally, however, the Regional Director is incorrect in asserting that the matter is being considered by the Board. On November 3, 1971 the United States Court of Appeals for the Eighth Circuit issued its decision in *Sears, Roebuck and Co., et al.* v. *Solien*, Nos. 20462, 20472, 78 LRRM 2700 ("Solien III") reference to which has been made in prior submissions to the Court in this case, and which involved the underlying case from which the instant procedural matters arose.* As a result of that opinion, Sears,

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*Solien III involved an effort to secure a determination of the participatory rights to which charging parties before the Board are entitled in the administrative disposition of their cases. Specifically, the charging parties there

Roebuck and Co., one of the charging parties below although not a party to the proceedings in this Court, sought a reconsideration by the General Counsel of this disposition of the merits of the underlying case and a transfer of the case from the Board, where it had been pending awaiting the decision in Solien III, to the office of the General Counsel. The General Counsel agreed to such a reconsideration (Appendix "A" attached hereto) following which, on No-

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claimed a right to participate in the negotiation of any settlement agreement which would affect their vital interests and adjust their legal rights, together with sufficient information from the Board's investigation to permit them to make informed and intelligent judgments and proposals in any such negotiations. While these contentions were made in the context of a settlement of the merits of the substantive charges filed with the Board, they would appear to apply equally to stipulations reached in district court injunction proceedings under Section 10(1) in which a favorable decision is at least as important to charging parties' rights and interests as at any other posture of the case. The Eighth Circuit's decision did not reach the merits of the charging parties' contentions, however, since the court held that the charging parties had not exhausted the administrative remedies available to cure the General Counsel's refusal to allow the requested participation. In recognizing the right of review of what appears to be a prosecutorial function of the General Counsel, the Court advanced the status of charging parties' rights under the Act, — an advance which would seem to apply equally to charging parties' rights to secure review of a district court's failure to permit informed participation in the negotiation of stipulations executed under Section 10(1). Moreover, such a development is entirely in accord with this Court's recent decision in *National Labor Relations Board* v. *Plasterers' Local Union No. 79, Etc., et al.*, Nos. 70-63, 70-65, December 6, 1971.

vember 22, 1971, the Board agreed to defer any further consideration or action until advised of the General Counsel's determination (Appendix "B"). Accordingly, the underlying case out of which the instant dispute arose remains pending and unresolved before the General Counsel. There is no proceeding currently before the Board. No "final adjudication of the Board" in this case is imminent, the matter is neither actually nor technically moot; and the Regional Director's contrary implication is incorrect.

Moreover, the Regional Director's assertion of mootness is predicated on acts which he committed apparently for the purpose of preventing any judicial resolution of the questions presented in the instant Petition. The Director found the existence of the requisite "reasonable cause" to believe the law was violated on June 16, 1970. Since the union's secondary boycott activity continued unabated thereafter, and since the Director declined to seek the "mandatory" injunctive relief therefor provided in Section 10(1), the petitioners, on June 19, 1970, filed the instant case to compel his doing so. On June 27, 1970, the dispute which had given rise to the unlawful boycott was resolved, and on June 29, the picketing ceased. However, it was not until June 29, 1970—hence *after* the resolution of the dispute, *after* the picketing had ended and *after the institution of this suit*—that the Director petitioned for an injunction to restrain picketing which had already been discontinued. The basis for this belated adherence to statutory direction is suggested by the fact that the Director thereupon moved to dismiss this suit, which sought a judicial determination of the nature of his duty to act promptly to enjoin unlawful picketing, on the ground that he had in fact sought such injunctive relief and the case was therefore "moot". The

Director coupled this argument with the assertion that he had no judicially reviewable duty to act but, having acted, the case should not proceed further.

The Director's Opposition to the Petition herein relies again on such a contention in a continuing effort to prevent ultimate judicial resolution of the issues raised in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
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November 15, 1971

Mr. George A. Leet
Associate Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: *Miscellaneous Drivers and Helpers Union, Local 610 (Sears, Roebuck and Co.)* Case Nos. 14-CC-603 and 14-CC-604

Dear Mr. Leet:

Pursuant to our oral request that the General Counsel reconsider approval of the instant settlement agreement in light of the decision by the Court of Appeals for the Eighth Circuit in *Sears, Roebuck and Co.* v. *Solien* (No. 20462 and No. 20472), and further reconsider our Objections to the Regional Director dated June 29, 1970 and Supplemental Objections to the General Counsel dated February 18, 1971, we have been advised today that the General Counsel has agreed to reconsider approval of the instant settlement agreement in light of said decision of the Eighth Circuit. We have been further advised that the General Counsel will provide the Union with a full opportunity to present its position on this matter.

In view of the foregoing, we request that your letter of November 8, 1971 setting a date for filing objections or statements of position to the Board be vacated and that, in accord with our Motions of March 26, 1971, the instant case be transferred to the office of the General Counsel. Alternatively, we would request that the time for filing objections or statements of position to the Board be extended until the General Counsel completes his consideration of this matter and at that time, if a new filing date is required, a reasonable date then be fixed.

Very truly yours,

LAWRENCE M. COHEN

Lawrence M. Cohen

For Lederer, Fox and Grove,
Attorneys for
Sears, Roebuck, and Co.

LMC:hy

cc of the attached letter sent to the following:

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APPENDIX B

NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

November 22, 1971

Re: Sears, Roebuck and Co.
Case Nos. 14-CC-603, 14-CC-604

Lawrence M. Cohen, Esq.
Lederer, Fox and Grove
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Dear Mr. Cohen:

This is with reference to your letter of November 15, 1971 concerning the above proceeding.

Since this office has been advised by the Office of the General Counsel that he has agreed to reconsider approval of the settlement agreement, the Board will defer any further consideration or action until after we are advised of the General Counsel's decision. Accordingly, all parties are advised that after the General Counsel has notified the Board of his decision and if he decides to affirm the action previously taken, a new date will be established for the